

SPECIAL BUSINESS MEETING  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

CALIFORNIA ENERGY COMMISSION  
HEARING ROOM A  
1516 NINTH STREET  
SACRAMENTO, CALIFORNIA

MONDAY, NOVEMBER 19, 2001

9:05 A. M.

Reported by:  
James Ramos  
Contract No. 150-01-006

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William J. Keese, Chairman

Michal C. Moore, Commissioner

Robert Pernell, Commissioner

Arthur H. Rosenfeld, Commissioner

Robert A. Laurie, Commissioner

PUBLIC ADVISOR

Roberta E. Mendonca

STAFF PRESENT

Nancy Tronaas

Chuck Najarian

William Chamberlain

Steve Larson

ALSO PRESENT

William Garbett (telephonically)

Jeffery Harris

Brian McDonald  
Calpine Corporation

Stephen Volker

Issa Ajlouny

Philip Mitchell

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1 P R O C E E D I N G S

2 9:05 a.m.

3 CHAIRMAN KEESE: Good morning, everyone.

4 Welcome to the California Energy Commission  
5 meeting.

6 Commissioner Pernell, would you lead us  
7 in the pledge, please.

8 (Whereupon, the Pledge of  
9 Allegiance was recited in unison.)

10 CHAIRMAN KEESE: Good morning, all.  
11 We'll start our week.

12 Item one, Sunrise Power Project,  
13 petition to convert the existing 320-megawatt  
14 simple-cycle power plant to a nominal 585-megawatt  
15 combined-cycle power plant.

16 MS. TRONAAS: Good morning. I'm Nancy  
17 Tronaas. I'm the compliance project manager for  
18 the Sunrise Power Project. This amendment will  
19 convert the existing 320-megawatt simple-cycle  
20 Sunrise Power Plant to a nominal 585-megawatt  
21 combined-cycle power plant that is scheduled for  
22 commercial operation in June of 2003. Commission  
23 staff has reviewed the proposed amendment and has  
24 prepared new and revised conditions of  
25 certification for Air Quality, Biology, Cultural

1 Resources, Facility Design, Hazardous Materials  
2 Management, Land Use, Worker Safety, and Soil and  
3 Water Resources.

4 Subject to these new and revised  
5 conditions, the project will remain in compliance  
6 with all laws, ordinances, regulations and  
7 standards, and all potential environmental impacts  
8 have been reduced to a less than significant  
9 level.

10 The staff analysis was posted on the  
11 Commissioner's web site and mailed to all parties  
12 that requested copies as well as affected public  
13 agencies for a ten-day review period. To date we  
14 have not received any comments on this petition.

15 To conclude, it's staff's opinion that  
16 the required findings of Section 1769 can be made  
17 and we recommend approval of the petition, subject  
18 to the new and revised conditions of certification  
19 presented in the staff analysis. And staff is  
20 here to answer any questions that you may have, as  
21 well as the project owner.

22 CHAIRMAN KEESE: Okay.

23 COMMISSIONER MOORE: Mr. Chairman?

24 CHAIRMAN KEESE: Commissioner Moore.

25 COMMISSIONER MOORE: This was

1       anticipated all along, and so I believe that this  
2       is following in course and on time for what we had  
3       expected. If there is no public comment, I'd be  
4       pleased to offer a motion for approval.

5               COMMISSIONER LAURIE: Second. Oh, I'm  
6       sorry, let me withdraw that and see if somebody  
7       else wants to second.

8               CHAIRMAN KEESE: We have a motion,  
9       Commissioner Moore?

10              COMMISSIONER MOORE: I'll offer the  
11       motion.

12              CHAIRMAN KEESE: Motion by Commissioner  
13       Moore.

14              COMMISSIONER LAURIE: I'll second.

15              CHAIRMAN KEESE: Second by Commissioner  
16       Laurie.

17              Any further discussion? Any public  
18       comment?

19              All in favor?

20              (Ayes.)

21              CHAIRMAN KEESE: Opposed?

22              Adopted, five to nothing.

23              MS. TRONAAS: Thank you.

24              CHAIRMAN KEESE: Thank you, Applicant.

25              Item two, the Sunrise Power Project is

1 over until December 5th; that is the petition to  
2 extend the simple cycle operations.

3 Item three, Calpine Gilroy Emergency  
4 Peaker Project, Commission consideration of a  
5 petition by Calpine to amend the decision in order  
6 to construct and operate a 1.7-mile natural gas  
7 pipeline reinforcement system along the existing  
8 rights-of-way.

9 MR. NAJARIAN: Good morning. My name is  
10 Chuck Najarian. I am the power plant compliance  
11 program manager.

12 CHAIRMAN KEESE: Good morning.

13 MR. NAJARIAN: This item concerns an  
14 amendment petition for the Calpine Gilroy City  
15 LM-6000 Emergency Peaker Project. The project is  
16 135-megawatt simple-cycle gas-fired project that  
17 you certified on May 15th of 2001. The project is  
18 currently under construction.

19 Calpine is requesting that the  
20 Commission amend the decision to construct a new  
21 1.7-mile natural gas pipeline; specifically, the  
22 proposed natural gas pipeline will replace two  
23 existing smaller lines and will use the same  
24 corridor as the existing lines. The new pipeline  
25 will provide natural gas supplies for both the



1       Gilroy City LM-6000 project and the existing 115-  
2       megawatt Calpine Gilroy Cogen project that was  
3       certified in 1985.

4               The proposed new pipeline will ensure an  
5       adequate supply of natural gas for the Gilroy City  
6       LM-6000 project during peak periods of demand.  
7       Staff confirmed with PG&E that the peak demand  
8       situations could impact gas supplies, given the  
9       limits of the existing lines.

10              As specified in staff's November 9th  
11       analysis, we are recommending modifications to the  
12       existing Cultural Resources condition two, and the  
13       addition of new Cultural Resources conditions four  
14       and five. These conditions will help to ensure  
15       that correct procedures are followed, in the event  
16       that any Native American burials or other Cultural  
17       Resources are encountered during excavation for  
18       the new line.

19              With these conditions, staff finds that  
20       the proposed modifications to the Gilroy project  
21       will not result in environmental impact and will  
22       remain in compliance with laws, ordinances,  
23       regulations and standards. Staff also finds that  
24       the modifications will be beneficial to the  
25       project owner and the public by ensuring an

1       adequate gas supply during peak periods.

2               In addition, staff finds that the  
3       amendment is based on information that was not  
4       available prior to Commission certification. And  
5       that Calpine was originally planning to construct  
6       the new line for the Gilroy Phase Two project,  
7       which is currently under review, and believe that  
8       development of the Phase Two would occur in time  
9       to meet the Gilroy City LM-6000 project fuel  
10      needs; however, at this point, if Gilroy Phase Two  
11      is certified, it will not be developed in time to  
12      meet those needs.

13              Therefore, consistent with these  
14      findings, staff recommends that the Commission  
15      approve Calpine's amendment petition to construct  
16      a new pipeline, including the modified and new  
17      conditions as specified in staff's analysis. That  
18      concludes my presentation.

19              COMMISSIONER LAURIE: Mr. Chairman, if I  
20      may --

21              CHAIRMAN KEESE: Commissioner Laurie.

22              COMMISSIONER LAURIE: -- I believe this  
23      petition, a, is in order; b, is really in the best  
24      interest of the community, let alone the project.  
25      I believe there are no negative environmental

1       implications resulting from the filing of the  
2       petition or from the completion of the revised  
3       project.

4               Accordingly, I would move to approve the  
5       petition to amend.

6               COMMISSIONER MOORE:   Second.

7               CHAIRMAN KEESE:   Motion by Commissioner  
8       Laurie and seconded by Commissioner Moore.

9               Did I understand you to indicate that  
10       this is the same right-of-way?

11              MR. NAJARIAN:   Yes, it is.

12              CHAIRMAN KEESE:   Exactly the same right-  
13       of-way, okay.   I have somebody on the phone who  
14       would like to comment on this.   Do we have  
15       anybody, any questions here from the Commission?  
16       Any public comments?

17              Mr. Garbett?

18              MR. GARBETT:   The Gilroy Foods  
19       Cogeneration Plant had an oil tank removed which  
20       was an auxiliary fuel source, which would have  
21       freed up the pipeline for availability for this  
22       peaking plant at Gilroy.   And the particular Phase  
23       Two, the Applicant has known about it.   He was  
24       dilatory and negligent and failed to move forward  
25       or do anything on the project.

1                   And, for that reason, at this point in  
2                   time, there should be a penalty associated with  
3                   failing to comply with the original application  
4                   for the Phase One of the Gilroy.

5                   CHAIRMAN KEESE: Are you suggesting that  
6                   the installation of this larger pipe on the old  
7                   right-of-way is detrimental?

8                   MR. GARBETT: I am suggesting it is  
9                   detrimental under CEQA because what happens is  
10                  you're basically going beyond the project limits  
11                  that were proposed under the Governor's emergency  
12                  proclamation. You're actually building a second  
13                  power plant by using the same pipeline.

14                  I am going to say that what happens is  
15                  that it would be prudent to construct the larger  
16                  pipeline; however, the applicant should be  
17                  penalized because he knew at all times the status  
18                  of the project and the fact that Gilroy Phase Two  
19                  was a pipe dream at this point in time.

20                  CHAIRMAN KEESE: Does the staff have a  
21                  response?

22                  MR. NAJARIAN: No response at this time.

23                  CHAIRMAN KEESE: Does the Applicant have  
24                  a --

25                  COMMISSIONER MOORE: Well, actually, let

1 me ask Mr. Najarian a question. With regard to  
2 the Phase One and the point that's raised by the  
3 caller, is there or was there any kind of  
4 condition that did not get complied with?

5 MR. NAJARIAN: All conditions were fully  
6 complied with. As I indicated earlier, there was  
7 an assumption on Calpine's part that the pipeline  
8 would be constructed as part of Phase Two and  
9 would be done in time to meet the needs for the  
10 Gilroy City LM-6000 project. That did not occur,  
11 and another fact is that the need for the pipeline  
12 is linked to peak demand only, and for periods of  
13 peak demand when we really want this power plant  
14 to be on line, there are questions as confirmed by  
15 PG&E as to whether or not there would be adequate  
16 supply for the power plant and other needs in the  
17 area.

18 And that's the basis for the amendment  
19 petition.

20 CHAIRMAN KEESE: Thank you. We have  
21 a --

22 COMMISSIONER MOORE: Maybe Mr. Harris  
23 can amplify on that for us. I'm still not hearing  
24 the answer that gets to the point that the caller  
25 raises, which is that there was some removal

1 implied in that, and I didn't hear the staff  
2 answer, and so I'll turn to the Applicant.

3 CHAIRMAN KEESE: Mr. Harris.

4 COMMISSIONER MOORE: Can you answer the  
5 question for me?

6 MR. HARRIS: Thank you for the  
7 opportunity to clarify. There was discussion  
8 about an oil tank that was removed, that's  
9 correct. That tank was for fuel oil, though.  
10 This project never burned fuel oil nor are we  
11 proposing to do so; this is strictly a natural  
12 gas-fired power plant and has been.

13 So there is no relationship whatsoever  
14 between that removed tank and the project. I want  
15 to --

16 COMMISSIONER MOORE: What was that fuel  
17 oil used for by the Gilroy Foods Company?

18 MR. HARRIS: Let me let Brian McDonald,  
19 the project manager, answer that question.

20 MR. MC DONALD: Hi, Commissioner Moore.

21 The fuel oil was originally used as a  
22 backup oil for our Cogen plant and I think it was  
23 used at one time and never has been used since  
24 then. And, in fact, one of the drivers for us to  
25 pull that tank, not only were we not using it but

1 the City Council in Gilroy had asked us if we  
2 could pull that tank out. It was an eyesore and  
3 they just wanted to see if we could pull that out  
4 before we started the project.

5 And we thought about it. It made a lot  
6 of sense, it had just been sitting around, so --

7 COMMISSIONER MOORE: Sitting around  
8 empty?

9 MR. MC DONALD: Yeah. It's been empty.

10 COMMISSIONER MOORE: Was there ever a  
11 spill?

12 MR. MC DONALD: No.

13 COMMISSIONER MOORE: A leak?

14 MR. MC DONALD: No.

15 COMMISSIONER MOORE: So there is no EPA  
16 sanction or anything else having to do with that  
17 tank, and it was removed. So it was a tank that  
18 used light bunker oil, then?

19 MR. MC DONALD: It was, yeah, number two  
20 fuel oil.

21 COMMISSIONER MOORE: All right, thank  
22 you.

23 CHAIRMAN KEESE: Okay. We have a motion  
24 and a second. Any further comments?

25 All in favor?

1 (Ayes.)

2 CHAIRMAN KEESE: Opposed?

3 Adopted, five to nothing. Thank you.

4 MR. HARRIS: Thank you.

5 CHAIRMAN KEESE: Item four, Metcalf  
6 Energy Center, Energy Commission consideration of  
7 a petition for reconsideration filed by Santa  
8 Teresa Citizen Action Group, the City of Morgan  
9 Hill, Great Oaks Water Company, Demand Clean Air  
10 and Californians for Renewable Energy.

11 Mr. Chamberlain, would you like to give  
12 us the context, please.

13 CHIEF COUNSEL CHAMBERLAIN: Yes, Mr.  
14 Chairman.

15 As the Commission is aware, petitions  
16 for reconsideration are provided for in Public  
17 Resources Code Section 25530 and Section 1720 of  
18 the Commission's regulations; however, neither of  
19 these sections address the question when the  
20 Commission should grant reconsideration. To  
21 answer that question, one must look to California  
22 Administrative case law.

23 Here it's clear that the purpose of  
24 reconsideration is to allow an agency to correct  
25 any legal errors in its decision before possible



1       judicial review; indeed, for over 40 years the  
2       rule in California was that a party that wished to  
3       seek judicial review was required to exhaust any  
4       administrative remedy, including an opportunity to  
5       seek reconsideration of a decision, or the right  
6       to a judicial challenge was lost.

7               About two and a half years ago in a case  
8       entitled *Sierra Club v. Lafco*, the California  
9       Supreme Court modified that rule, requiring  
10      parties to seek reconsideration only when the  
11      statute made clear that doing so was intended to  
12      be mandatory and a prerequisite to judicial  
13      review.

14             Because the wording of Section 25530 is  
15      permissive -- that is, parties may seek  
16      reconsideration -- parties are not required to  
17      seek reconsideration before challenging a  
18      Commission decision. Indeed, the decision in this  
19      case was challenged by one of the Intervenors in  
20      this case on October 24th, 2001 in the California  
21      Supreme Court, and that challenge has since been  
22      dismissed.

23             With regard to the petition before you,  
24      the test for deciding whether to grant  
25      reconsideration would still be based on whether

1       the petition makes a case that there is a legal  
2       flaw in the decision that the Commission should  
3       correct. Reconsideration is a sort of compromise  
4       between the desirability of finality in decisions  
5       and the desirability of being sure the Commission  
6       has the opportunity to get the decision right.

7               So if the Petitioner convinces you that  
8       there is one or more findings in the decision that  
9       are not supported by substantial evidence in the  
10      record in this proceeding, this is your  
11      opportunity to grant reconsideration and  
12      supplement the record or correct the findings.  
13      If, on the other hand, you conclude that the  
14      Petitioner is merely re-arguing matters that have  
15      been fully considered in the decision, then the  
16      petition should be denied.

17             As you are aware, a petition for  
18      reconsideration requires an affirmative vote of  
19      three members of the Commission, and if you vote  
20      to reconsider, you can either, depending on the  
21      circumstances, you could either make the decision  
22      today or set the matter for a further hearing, if  
23      further evidence was required.

24             COMMISSIONER MOORE: Mr. Chairman?

25             CHAIRMAN KEESE: Commissioner Moore.

1                   COMMISSIONER MOORE: I have a question  
2                   for Mr. Chamberlain.

3                   Mr. Chamberlain, are you then suggesting  
4                   that the matter that would be before us today that  
5                   could be argued is one that is strictly bound by a  
6                   legal or potential legal flaw in the decision that  
7                   we made; that, in fact, the merits of the case are  
8                   not before us; only those matters which might  
9                   suggest that the decision itself had an inherent  
10                  or obvious flaw?

11                  CHIEF COUNSEL CHAMBERLAIN: Well, the  
12                  merits of the case are before you, but I believe  
13                  that you should look at them in the same way a  
14                  court would; that is, you should look at them from  
15                  the perspective of whether there was a clear legal  
16                  error that you wish to correct before it goes on  
17                  to a court for that purpose.

18                  COMMISSIONER MOORE: Thank you. And one  
19                  other point concerning your earlier remark about  
20                  the petition which went to the Supreme Court that  
21                  was subsequently rejected, what was the nature of  
22                  that petition and what were the grounds for the  
23                  rejection?

24                  CHIEF COUNSEL CHAMBERLAIN: The nature  
25                  of the petition was -- I can't recall the specific

1 points that were made. It was by Mr. Garbett who  
2 was just on the phone. He was in essence asking  
3 the court to overturn the Commission's decision,  
4 claiming that there were legal errors.

5 The nature of the dismissal is not  
6 clear, there was simply an order that said that  
7 the petition was dismissed.

8 COMMISSIONER MOORE: That they declined  
9 to hear it.

10 CHIEF COUNSEL CHAMBERLAIN: Right.

11 COMMISSIONER MOORE: And it is clear  
12 that if there were, if we failed to reconsider our  
13 decision, anyone who was dissatisfied would have  
14 to go back to that same body; that would be their  
15 first and last stop. No intermediate steps to get  
16 judicial review?

17 CHIEF COUNSEL CHAMBERLAIN: That appears  
18 to be the case under the statute as it's been  
19 redrafted by the Legislature this year in SB 28x.

20 COMMISSIONER MOORE: All right. So,  
21 Mr. Chairman, I'm satisfied that Mr. Chamberlain  
22 has outlined the parameters of what we would hear  
23 today, which is a challenge on the basis of the  
24 legal soundness of the decision that we made or  
25 potential for a flaw in that decision or in our

1 own procedures.

2 CHAIRMAN KEESE: Thank you. I believe  
3 the way -- Since we have a joint petition, why  
4 don't --

5 MR. PERNELL: Mr. Chairman, I have a  
6 question for Mr. Chamberlain.

7 CHAIRMAN KEESE: Commissioner Pernell.

8 MR. PERNELL: I thought I heard you say  
9 this, but just for my clarification, if there's  
10 new information that comes forward, it would also  
11 be a basis for us to consider, in terms of  
12 reconsideration?

13 CHIEF COUNSEL CHAMBERLAIN: I believe  
14 the Commission has the ability to do that; I  
15 believe you're correct in that, Commissioner. I  
16 believe that that would be similar to the way  
17 courts will sometimes take new evidence that could  
18 not have been provided in the normal course of the  
19 original trial. Sometimes in a petition for  
20 rehearing, a court will allow someone to come  
21 forward with new evidence if it can be shown that  
22 they were not dilatory in any way in not bringing  
23 the evidence to the attention of the court in the  
24 first instance.

25 However, you need to also consider the

1 fact that the Applicant has a legitimate  
2 expectation of a timely decision. And obviously,  
3 taking new evidence does interfere with their  
4 ability to proceed with the project. So you have  
5 to balance these things and if the new evidence is  
6 really critical to the soundness of your decision,  
7 then you should grant reconsideration and take  
8 that new evidence.

9 If, on the other hand, the new evidence  
10 is simply cumulative of evidence that you already  
11 have in the record, then you should probably not  
12 do that.

13 MR. PERNELL: Thank you,  
14 Mr. Chamberlain.

15 CHAIRMAN KEESE: Okay. Since this is a  
16 joint petition and I have requests by Mr. Volker,  
17 Mr. Mitchell and Mr. Ajlouny to testify, and  
18 Mr. Garbett on the phone, I will leave it up to  
19 you in what order you'd like to start this.

20 COMMISSIONER LAURIE: Commissioner  
21 Laurie.

22 COMMISSIONER LAURIE: Mr. Chairman,  
23 before you ask for, and this isn't testimony, it's  
24 comment, I want to have an understanding of the  
25 nature and extent and scope of the comments that

1       we're going to hear today. We have written  
2       briefs, written filings. Are you just asking for  
3       a summarization of those comments, and are you  
4       going to place time limits on the comments? I'd  
5       like some ideas to what the intent of the parties  
6       may be.

7               CHAIRMAN KEESE: Why don't we ask the  
8       Petitioner what they have in mind before we make  
9       any kind of particular ruling.

10              Commissioner Laurie is correct, we have  
11       the documents in front of us.

12              MR. VOLKER: May I address the  
13       Commission?

14              CHAIRMAN KEESE: Certainly.

15              MR. VOLKER: Good morning. My name is  
16       Stephen Volker, I am counsel to the Petitioner,  
17       Santa Teresa Citizen Action Group, et al. We  
18       estimate that, among the three speakers on behalf  
19       of Petitioners, a total time of 20 minutes.

20              CHAIRMAN KEESE: Thank you.

21              MR. VOLKER: Thank you.

22              CHAIRMAN KEESE: I think that's fine.

23              Mr. Ajlouny, do you want to start us  
24       off, then?

25              MR. AJLOUNY: Good morning,

1 Commissioners. My name is Issa Ajlouny and I just  
2 have a few minutes. Like you said, a lot of it  
3 has already been documented.

4 But one thing that I found out that was  
5 new, and that's the key word new: In the hearing,  
6 Commissioner Keese, that you were in, I think it  
7 was the 5th of this month, I'm forgetting --  
8 Behymer or something, your air quality guy with  
9 the California Energy Commission -- stated that  
10 Calpine was not in compliance with air quality on  
11 two power plants, Sutter and I want to say  
12 somewhere -- Los something -- What is it?

13 MR. VOLKER: Los Medanos.

14 MR. AJLOUNY: -- Los Medanos, and  
15 further investigation, I basically printed out  
16 those transcripts. I could read them to you or,  
17 Commissioner Keese, maybe you can acknowledge that  
18 he did say that, it's up to you.

19 Do you remember that? Do you remember  
20 that, Commissioner?

21 CHAIRMAN KEESE: I do not remember the  
22 specific -- You're going to have to use the words.

23 MR. AJLOUNY: Okay. Well, I'll just --  
24 Basically, I was hoping not to take up the time  
25 for you, but let me just -- Mr. -- I'm not



1 pronouncing it correctly, but Behymer or  
2 something? How is it?

3 MR. VOLKER: Badr, Magdy Badr.

4 MR. AJLOUNY: No, not Magdy, this is  
5 B-e-h-y-m-e-r with the California Energy  
6 Commission.

7 He says, "Hello, my name is Gabriel  
8 Behymer. I am the air quality expert with the  
9 CEC. My understanding from the district is that  
10 the PDOC should be issued on the 12th of November.  
11 This is for Los Esteros. The representative of  
12 the district will be available at the meeting  
13 tomorrow to comment on this fact, though," and  
14 then Commissioner Keese says, "Are there any  
15 questions? When you say will be issued, you are  
16 saying there are no surprises? And that is what  
17 are the -- do you have a hint of what they are  
18 going to issue?"

19 Mr. Behymer: "I believe that the  
20 district has no major issues with the project.  
21 They do have a concern with Calpine's compliance  
22 with regard to their own power plants right now.  
23 And they have a regulation that prevents them from  
24 issuing a final determination of compliance;  
25 however, it has not been determined whether or not

1       they have been able to issue the PDOC," and it  
2       goes further.

3               So what I did is I talked to  
4       Mr. Behymer, I'll just say that, and I talked to  
5       him and he confirmed that with me, and then sent  
6       me an e-mail that he received from the Air  
7       district, stating from a Mr. Wyman, "I want to  
8       update you on the status of the RCEC," and I don't  
9       know what R plant that is, "PDOC. District  
10       Regulations 2-2-307 require certification that all  
11       major facilities owned and operated by the  
12       Applicant are in compliance with all applicable  
13       emission limits and standards.

14              "A certification of compliance from the  
15       Applicant was included with the application;  
16       however, we recently received source tests,  
17       results from Calpine power plants Los Medanos and  
18       Sutter that show non-compliance with POC limits.  
19       We are waiting for the Applicant to resolve this  
20       issue and to submit an update of certification of  
21       compliance before issuing the PDOC."

22              I just wanted to bring that up to you,  
23       that I know the certification letter that Calpine  
24       wrote I think was over two and a half years ago.  
25       It's quite old and these are just things on the

1 record for another case, stating that Calpine was  
2 not in compliance, but maybe you can ask them to  
3 confirm that.

4 But that's all I have to say. Thank  
5 you.

6 CHAIRMAN KEESE: Thank you. We'll hear  
7 the rest of the testimony.

8 MR. MITCHELL: Good morning. My name is  
9 Phil Mitchell. I just have one point I wanted to  
10 bring out in today's proceeding in our petition  
11 for reconsideration, and that's regarding the lack  
12 of fair hearing.

13 MR. PERNELL: It's regarding what, I'm  
14 sorry?

15 MR. MITCHELL: The lack of fair hearing.

16 MR. PERNELL: The lack of fair hearing?

17 MR. MITCHELL: Right. It's one of the  
18 issues in our motion and in the response brief by  
19 the CEC attorney.

20 I wanted to correct the statement that  
21 there have been timely notifications of these  
22 meetings, the several workshops and hearings  
23 before you. There are instances in the record  
24 where notice was not received in a timely manner;  
25 in fact, this meeting I received notice for this

1 Thursday, four days before the hearing.

2 Our attorney also received a phone call  
3 on Thursday, notifying us of the hearing.

4 CHAIRMAN KEESE: Yes. The staff has  
5 apologized for that. I believe you probably were  
6 aware that we were going to have the hearing.

7 MR. MITCHELL: No, we had no official  
8 notice of the hearing.

9 CHAIRMAN KEESE: You weren't aware?

10 MR. MITCHELL: No.

11 CHAIRMAN KEESE: Okay.

12 MR. MITCHELL: Furthermore, I wanted to  
13 point out that in a related proceeding before the  
14 Bay Area Air Quality Management District Hearing  
15 Board that your attorney, Richard Ratliff, was  
16 involved in a hearing before that hearing board,  
17 in that hearing and in actions leading up to that  
18 hearing, which involved discussions with the  
19 outside counsel retained by the hearing board, a  
20 Robert Perlmutter, who works for Shute, Mihaly and  
21 Weinberger.

22 In those proceedings, in the hearing  
23 itself and in the proceedings leading up to that,  
24 there was no disclosure by either Robert  
25 Perlmutter or, more importantly, to you all by

1 Richard Ratliff, the CEC counsel, that there was  
2 no disclosure about the relationship between the  
3 outside counsel's firm, Shute, Mihaly and  
4 Weinberger, and the CEC.

5 Now, to refresh your memory, you have a  
6 \$250,000 contract with Shute, Mihaly and  
7 Weinberger for the siting of power plants, for  
8 counsel, to receive counsel from them on the  
9 siting of power plants. And the hearing -- I want  
10 to point out that the hearing board at the Air  
11 district relied on Mr. Perlmutter's counsel in  
12 arriving at their decision regarding this matter  
13 before them, the air permit, the problems with the  
14 air permit before them. Mr. Perlmutter's  
15 testimony was relied on by them in arriving at  
16 their decision.

17 I would like to know why this  
18 relationship between the CEC and their outside  
19 counsel was not disclosed in that proceeding. I  
20 think we deserve an answer to that. That's one  
21 instance of fair hearing that we've been denied.

22 CHAIRMAN KEESE: Thank you.

23 CHIEF COUNSEL CHAMBERLAIN: Mr. Chairman

24 CHAIRMAN KEESE: Mr. Chamberlain, would

25 //

1       you like to try to get us out of this quagmire?

2               CHIEF COUNSEL CHAMBERLAIN:  -- I would  
3       be happy to address that question, but it is not  
4       relevant to the petition for rehearing in this  
5       matter.  This is a question of whether the  
6       Commission's decision is in some way legally  
7       defective.  What he's just raised is a question of  
8       whether there is a conflict of interest based on  
9       the fact that the same law firm does some work for  
10      the hearing board of the Bay Area Air Quality  
11      Management District, and also for the Energy  
12      Commission.  And this became an issue in the  
13      decision of the -- I'm sorry, in the hearing  
14      before the hearing board on the question, whether  
15      the hearing board would reconsider the PSD permit  
16      for this project.

17             CHAIRMAN KEESE:  For this project, our  
18      project?

19             CHIEF COUNSEL CHAMBERLAIN:  For our  
20      project.

21             MR. MITCHELL:  If I may --

22             CHAIRMAN KEESE:  So this was before the  
23      hearing board at one time?

24             CHIEF COUNSEL CHAMBERLAIN:  It was  
25      before the Bay Area Air Quality Management

1 District's hearing board, yes.

2 MR. MITCHELL: If I may, in the brief  
3 prepared by Richard Ratliff, there is reference to  
4 the proceedings before the hearing board and I  
5 would argue that those proceedings are indeed  
6 relevant to this motion for reconsideration; in  
7 particular, our statements about lack of fair  
8 hearing throughout this process. This is one  
9 strong indication of the lack of integrity in your  
10 process.

11 CHAIRMAN KEESE: Okay. If that's your  
12 point, then that's okay.

13 All right.

14 MR. PERNELL: Mr. Chairman, just one  
15 question on that.

16 Mr. Chamberlain, this is not a new  
17 issue, because it's been addressed before with the  
18 Bay Area Air Quality District?

19 CHIEF COUNSEL CHAMBERLAIN: It's my  
20 understanding that both -- Well, let me just say  
21 that the question of conflict of interest, when  
22 two clients hire the same attorney, is one that is  
23 covered by the Bar ethics of the State of  
24 California, the Ethics Code. The Ethics Code  
25 requires the member of the Bar, who would be

1       representing both parties, to be completely open  
2       and up front with both clients as to the fact that  
3       they are representing other parties.

4               This was done with that firm. We  
5       accepted -- They had been representing the hearing  
6       board for many years. It was understood that we  
7       would not be receiving work from the same  
8       attorneys in that firm, and both the hearing board  
9       or both the Bay Area Air Quality Management  
10      District and the Energy Commission I believe  
11      knowledgeably hired Shute, Mihaly and Weinberger,  
12      and there were different attorneys.  
13      Mr. Perlmutter represents the hearing board on a  
14      regular basis. Mr. Mihaly and Mr. Nowie have been  
15      representing us on some completely different  
16      matters.

17             And I'm unaware of any communications  
18      between the members of that firm with respect to  
19      the substance of any of the matters relating to  
20      the Metcalf proceeding.

21             CHAIRMAN KEESE: Thank you.

22             Mr. Volker?

23             MR. VOLKER: Thank you. Good morning  
24      again, my name is Stephen Volker. I represent the  
25      Petitioners in this proceeding.



1                   I wish to reserve five minutes of  
2                   rebuttal out of our 20 minutes so that we can  
3                   respond to any arguments advanced in opposition to  
4                   our comments this morning.

5                   CHAIRMAN KEESE:  You know, the  
6                   standard -- Let me just suggest that the standard  
7                   we heard is clear legal error.  You're going to  
8                   demonstrate clear legal error?  I haven't heard  
9                   that yet, so if you're going to wait for rebuttal,  
10                  you're going to have to be rebutting something.  
11                  So you'd better have quite a bit in your  
12                  demonstration of clear legal error.

13                  MR. VOLKER:  I didn't mean to suggest  
14                  that I wasn't going to now advance the affirmative  
15                  case.  I'm simply advising you I'd like to reserve  
16                  five minutes from my time.

17                  CHAIRMAN KEESE:  If there is a response  
18                  to your --

19                  MR. VOLKER:  Yes.

20                  CHAIRMAN KEESE:  Okay, thank you.

21                  MR. VOLKER:  Yes, of course, right.

22                  Also, for the record, I wanted to point  
23                  out that not only did we not receive timely notice  
24                  of this hearing, but we did not receive the  
25                  staff's opposition brief until Friday.  And I

1 received Calpine's opposition brief yesterday,  
2 Sunday. And I would ask that we be afforded an  
3 additional two days to file a written response to  
4 those submissions. They are lengthy and I think  
5 they warrant a written response.

6 COMMISSIONER LAURIE: Mr. Chairman,  
7 question?

8 CHAIRMAN KEESE: Commissioner Laurie.

9 COMMISSIONER LAURIE: One, I don't know  
10 how in the world adequate notice was not provided.  
11 I mean, it wasn't set on the agenda as an  
12 emergency basis, so I don't know how that could  
13 have happened.

14 CHAIRMAN KEESE: It was on the ten-day  
15 notice of the hearing.

16 COMMISSIONER LAURIE: But, you know, I  
17 don't want to have this lack of notice as an  
18 issue. If the folks feel they did not have  
19 adequate time to prepare, then let them request a  
20 continuance and we'll call them back and we'll do  
21 this again. I don't want to have this as an  
22 issue.

23 We've been hearing this case for two and  
24 a half years, and we again have an issue of lack  
25 of fair hearing. I don't want to have that as an

1       issue.  If they're not prepared to proceed today,  
2       if we messed up, fine.  Let's not hear it today.  
3       But I don't want to have the question of lack of  
4       notice on the table.  If there was a lack of  
5       notice, then we should not be hearing it today,  
6       and we'll come back in two weeks and do it all  
7       over again.

8                So my request would be to ask staff if  
9       there was adequate notice; if not, then let's not  
10      hear it today.

11               MR. PERNELL:  Mr. Chairman --

12               CHAIRMAN KEESE:  Commissioner Pernell.

13               MR. PERNELL:  -- I would agree with  
14      Commissioner Laurie on this, and the fact of the  
15      matter is, Metcalf has been going on for a long  
16      time.  And if the Petitioners didn't get notice of  
17      the original case, which is where the argument  
18      should be made, not on a technicality and throw  
19      out two and a half years of work just because you  
20      didn't get a ten-day notice -- I mean, if that's  
21      all your case is about, then I'm not sure we're  
22      making good use of our time.

23               I would agree with Commissioner Laurie  
24      that if there is a flaw in the two and a half  
25      years, then that's one thing to reconsider.  But

1       just because you didn't get a notice of  
2       reconsideration, to throw out two and a half years  
3       of work I think is a little premature.

4               CHAIRMAN KEESE:  Mr. Chamberlain, are  
5       you familiar with the --

6               CHIEF COUNSEL CHAMBERLAIN:  Yes, I am.

7               CHAIRMAN KEESE:  As I understand it,  
8       this was properly noticed in our agenda.  What was  
9       not is that it was not sent to the parties?

10              CHIEF COUNSEL CHAMBERLAIN:  It was  
11       placed on the agenda; there was a delay in mailing  
12       it to the service list as a result of the fact  
13       that the service list is maintained by the hearing  
14       office and we placed the matter on the agenda.

15              CHAIRMAN KEESE:  All right.  And then  
16       the parties also received a phone call informing  
17       them specifically --

18              CHIEF COUNSEL CHAMBERLAIN:  Yes.

19              CHAIRMAN KEESE:  -- that this had  
20       happened.  Now, are you raising on behalf of the  
21       parties that you don't believe it was adequate  
22       notice?

23              MR. VOLKER:  Yes.

24              CHAIRMAN KEESE:  All right.

25              Commissioner Laurie?

1                   COMMISSIONER LAURIE: Mr. Chairman, I  
2                   would move that this matter be continued for at  
3                   least two weeks, if not 30 days, and provide legal  
4                   adequate notice.

5                   MR. HARRIS: Mr. Chairman --

6                   CHAIRMAN KEESE: Yes, Mr. Harris.

7                   MR. HARRIS: -- I'd like to address this  
8                   issue. This is Mr. Harris. I would note for you  
9                   that there is a -- on this lack of notice question  
10                  that Mr. Volker has raised, there's a lack of  
11                  evidence about a lack of notice. It's simply an  
12                  assertion by Mr. Volker.

13                 You know, unless Mr. Chamberlain or  
14                 someone can point to a statute that was not  
15                 followed, the ten-day notice went out, you've met  
16                 the legal requirements. This case has been going  
17                 on for two and a half years and the Applicant has  
18                 due process rights as well, which include the  
19                 right to a timely hearing. And I would really  
20                 like to proceed, unless there's a showing. And I  
21                 think Mr. Volker has the burden here, and he has  
22                 not met that. Let that be very clear. There is  
23                 no evidence before you that he has met that  
24                 burden.

25                 COMMISSIONER LAURIE: Mr. Chairman, a

1 clarification --

2 CHIEF COUNSEL CHAMBERLAIN: The ten-day  
3 notice was posted.

4 COMMISSIONER LAURIE: -- and is there  
5 additional requirement?

6 MR. HARRIS: If there is, it would be in  
7 our regulations. I have not been able to find any  
8 specific requirement that a reconsideration  
9 petition, you know, putting that on the agenda  
10 requires anything other than the normal Open  
11 Meetings Act agenda notice.

12 CHIEF COUNSEL CHAMBERLAIN: And that's  
13 the point. We find nothing in the regulations,  
14 Mr. Chamberlain finds nothing in the regulations,  
15 Mr. Volker has the burden of producing an  
16 authority for his proposition; otherwise, it's  
17 like the rest of this petition, it's unsupported.

18 COMMISSIONER LAURIE: I will note that  
19 the agenda goes on the web. I'm not exactly sure  
20 when that happened in this case, but it normally  
21 goes on the web at least a week before the  
22 meeting. Also, any of the parties could have  
23 requested direct mail of all business meeting  
24 agendas. These parties filed their petition on  
25 October 24th. They knew that it had be acted upon

1 by November 24th, so they could have been checking  
2 daily to see whether the matter was on the agenda.

3 The fact that they sat by and waited  
4 until perhaps a few days before, before they got  
5 notice, is unfortunate. But I would note that the  
6 Commission loses jurisdiction over this on the  
7 23rd, which is the Friday which is a holiday. So  
8 actually, I suppose you would have until next  
9 Monday. That would be the latest date on which  
10 you could hear this matter. Otherwise, the  
11 petition is denied as a matter of law.

12 CHAIRMAN KEESE: So if we take no  
13 action, the petition is denied as a matter of law.

14 CHIEF COUNSEL CHAMBERLAIN: That's  
15 correct.

16 CHAIRMAN KEESE: And are we required to  
17 hold a hearing?

18 CHIEF COUNSEL CHAMBERLAIN: No.

19 CHAIRMAN KEESE: Within that 30-day  
20 period?

21 CHIEF COUNSEL CHAMBERLAIN: No.

22 MR. HARRIS: Commissioner, if I could,  
23 again, Mr. Harris, the record here, the record of  
24 this proceeding is very clear. We followed your  
25 ten-day requirement. The complaint here is

1        basically that they wanted more than they're  
2        entitled to, and not that they're being deprived  
3        of something they weren't entitled to to begin  
4        with.

5                    And so, you know, based on that, we  
6        would like to proceed, absent a showing by  
7        Mr. Volker that he has a right to ask for this.

8                    MR. VOLKER: I'm prepared to make that  
9        showing now, if I might swear in some witnesses.

10                   CHAIRMAN KEESE: Mr. Volker, you have  
11        heard our counsel suggest that if we don't hear  
12        this today, that this petition will be denied as a  
13        matter of law.

14                   MR. VOLKER: I understand that if it's  
15        not heard by Monday next week, the 26th -- I  
16        believe that's what your counsel advised you.

17                   And we would stipulate to a hearing on  
18        Monday, next week. But if I might, I've been  
19        challenged with respect to whether the requisite  
20        notice was provided, and I would like to meet that  
21        challenge now, if I might.

22                   CHAIRMAN KEESE: That it was on our  
23        web -- Okay. You have somebody who is going to  
24        indicate that -- we have heard that it was posted  
25        in our agenda with a ten-day notice, and you're



1 going to establish that we didn't post it and give  
2 ten days notice of this hearing?

3 MR. VOLKER: Yes. Yes, I would like to  
4 call Mr. Issa Ajlouny, and, following his  
5 testimony, Mr. Phil Mitchell, if I might.

6 MR. HARRIS: Could I ask the nature of  
7 the testimony on this legal question?

8 CHAIRMAN KEESE: All right.

9 MR. VOLKER: The purpose of the  
10 testimony is to clarify that the requisite notice  
11 was not afforded.

12 COMMISSIONER MOORE: Mr. Chairman, if I  
13 may, let me just ask counsel a question that may  
14 clear this up in my mind.

15 In the petition that got us to have this  
16 kind of a hearing noticed or posted in the first  
17 place, there was a written filing made to this  
18 Commission. And that's in our -- we docketed that  
19 and copies were made available; is that correct?

20 MR. VOLKER: Yes.

21 COMMISSIONER MOORE: Is there  
22 information that you are intending to present  
23 today or are in some way going to put forward that  
24 is different than what is in your petition?

25 MR. VOLKER: With respect to this issue

1 of inadequate notice of today's hearing, yes.

2 COMMISSIONER MOORE: That's the issue  
3 where the difference comes. So what's submitted  
4 in the written testimony which is made with regard  
5 to the kind of decision that we made still stands,  
6 and the difference being, in terms of your  
7 testimony today, is that you're arguing that not  
8 adequate notice was given.

9 MR. VOLKER: And also, as we have a  
10 right to do, we were going to summarize the  
11 arguments advanced in writing, and respond to some  
12 of the statements made in the opposition,  
13 although, as I've indicated, I did not receive the  
14 staff's opposition until Friday and have not  
15 officially received the Applicant's opposition.

16 CHAIRMAN KEESE: Is that a --

17 COMMISSIONER MOORE: Well, Mr. Chairman,  
18 I still have one other question, if I can.

19 CHAIRMAN KEESE: Sure.

20 COMMISSIONER MOORE: So in the points  
21 that you are intending to raise today that were  
22 the items that you would expect us to consider  
23 with regard to a reconsideration of our previous  
24 decision, they are, in fact, written in your  
25 submittal and would have summarized by you if you

1       were to proceed today?

2               MR. VOLKER:  Not completely.  There is a  
3       hearing for the purpose of responding to arguments  
4       advanced in opposition to the petition.  
5       Naturally, those arguments could not be made in  
6       the opening brief and are appropriate for a  
7       hearing of this kind.

8               COMMISSIONER MOORE:  And so what I'm  
9       looking for, and I guess I'm just not asking my  
10      question clearly enough, is whether or not there  
11      is any new information about our decision that is  
12      not included in your petition?

13              MR. VOLKER:  There may be, depending on  
14      how one views arguments advanced at a hearing in  
15      response to opposition statements.  Also, an  
16      October 19 PG&E submission to the ISO, the 2001  
17      Electric Transmission Grid Expansion Plan presents  
18      some information that I think is most pertinent to  
19      this Commission's review.

20              CHAIRMAN KEESE:  Commissioner Moore, if  
21      I may, we're looking for clear legal error.  And  
22      you submitted your documents indicating to us that  
23      you believed that there was clear legal error,  
24      which would be the standard.  And we've had two  
25      filings that have indicated opposition to that

1 petition.

2           You are here, the three of you are here.  
3       You filed the first document knowing what had  
4       taken place in this case and looking for the clear  
5       legal error. Our counsel has advised us that we  
6       gave proper notice to this meeting. I don't  
7       see -- Counsel has also advised us that if we  
8       don't do it by next Monday, and we're not going to  
9       be having a hearing before next Monday, we're not  
10      going to be having another meeting, so I would  
11      urge you to go forward and present the best case  
12      you can.

13           MR. VOLKER: Well, initially, then, I  
14      will proceed by calling the two witnesses I have  
15      named to respond to the notice issue.

16           COMMISSIONER MOORE: But wait, two  
17      witnesses --

18           CHAIRMAN KEESE: Finish --

19           COMMISSIONER MOORE: -- Mr. Chairman,  
20      those -- Wait, let's get down to practical stuff  
21      here. I'm not a lawyer and it's dawning on me  
22      that I probably wouldn't have had the fortitude to  
23      go through this kind of stuff in law school, so if  
24      you'll forgive me for that, I am very interested  
25      in counsel's arguments, and I am very interested

1 in having him elaborate on what might or might not  
2 have made the decision different at the level that  
3 the Commissioners heard it or at the level that  
4 we, in fact, reviewed it.

5 Frankly, I'm not interested in going  
6 down the road of whether or not this is a good  
7 hearing or a bad hearing; I'd rather hear the  
8 facts. And, having read the petitions and having  
9 come here this morning, I'm ready to hear  
10 counsel's argument. I'm not anxious to pursue  
11 whether or not this is a proper hearing or not,  
12 since we don't have enough notice to convene  
13 another one, and I'd rather make a decision while  
14 we still have the jurisdiction to do that.

15 I understand -- Mr. Chamberlain is  
16 leaping to the microphone -- I understand there is  
17 the option to continue this hearing, which would  
18 make it possible to go on to Monday, but not the  
19 option to re-notice it. We don't have enough time  
20 to re-notice.

21 CHIEF COUNSEL CHAMBERLAIN: That's  
22 correct. And I would also simply note that I  
23 understand Mr. Volker's concern that he didn't  
24 have a lot of time with the oppositions that were  
25 filed, but there are no specific guidelines for

1       when oppositions to a petition for reconsideration  
2       need to be filed. In essence, the Petitioner  
3       needs to make his case affirmatively, and --

4               CHAIRMAN KEESE: And that's what I think  
5       we should see if we can get, the clear legal error  
6       demonstrated for us.

7               MR. VOLKER: Well, as I understand it,  
8       there's been an objection to the hearing today on  
9       the grounds of inadequate notice, and I have made  
10      an offer of proof to present witnesses attesting  
11      to the fact that notice of this hearing was not  
12      circulated to the parties as required by law and  
13      was not posted in a timely manner as required by  
14      law.

15              And unless I'm given permission to  
16      actually present that testimony, I will move on.  
17      Is that a correct understanding of the  
18      Commission's disposition of my proposed offer of  
19      proof?

20              CHAIRMAN KEESE: Our counsel has advised  
21      us that we gave proper notice of this meeting.

22              MR. HARRIS: And, to be clear -- This is  
23      Mr. Harris -- to be clear, we are perfectly  
24      willing to listen to you cite legal authorities  
25      for the proposition that there was inadequate

1 notice. I don't think witnesses are proper for  
2 that legal question, and I'm prepared to sit here  
3 all morning and hear your legal authorities, if  
4 you have them.

5 So you have not been, in my view,  
6 curtailed in any way in putting forth your legal  
7 arguments for your unsupported claim.

8 MR. VOLKER: And I would also add to the  
9 list of witnesses Mr. Valkovsky, whom I believe  
10 would testify, contrary to the suggestion of  
11 counsel, that this matter was not, notice of this  
12 matter was not given his office --

13 COMMISSIONER LAURIE: Mr. Chairman, I am  
14 not prepared to listen to witnesses today. Legal  
15 argument has been filed and I'm prepared to listen  
16 to a summarization of legal argument, period.

17 CHAIRMAN KEESE: That's what we're going  
18 to try to get.

19 COMMISSIONER LAURIE: I am not prepared  
20 to listen to witnesses today.

21 CHAIRMAN KEESE: Mr. Volker?

22 MR. VOLKER: Well, then if I'm not  
23 permitted -- Is that is the ruling of the  
24 Commission to present --

25 CHAIRMAN KEESE: We were going to take

1       20 minutes on this. We'd like to hear your  
2       arguments as to clear legal error, following up on  
3       what you submitted previously that we have in  
4       front of us.

5               MR. VOLKER: Then you're not permitting  
6       me to present testimony with respect to the  
7       objection raised --

8               CHAIRMAN KEESE: We're not presenting  
9       testimony here, we're presenting argument about  
10      your filing.

11              MR. VOLKER: I'd appreciate if you'd  
12      allow me to finish my statement, I've been  
13      interrupted a number of times and I don't think  
14      it's fair to me.

15              CHAIRMAN KEESE: Okay.

16              MR. VOLKER: I want the record to be  
17      clear that the Petitioners made an offer of proof  
18      to present testimony with respect to the lack of  
19      notice required by law, and I have not been  
20      afforded that opportunity.

21              I will now move on --

22              CHAIRMAN KEESE: But you have not  
23      indicated --

24              MR. PERNELL: Mr. Chairman, if I may?  
25      Mr. Chairman, this is --



1                   You are their legal counsel; is that  
2                   correct, sir?

3                   MR. VOLKER: I have introduced myself as  
4                   such three times, yes.

5                   MR. PERNELL: Right, okay. Now, follow  
6                   me on this, because this is real simplistic. You  
7                   are prepared to make arguments to your brief that  
8                   you filed; are you or are you not?

9                   MR. VOLKER: I have said that, yes.

10                  MR. PERNELL: Okay. And what the  
11                  Chairman is saying is present your arguments. Can  
12                  we proceed in that fashion?

13                  MR. VOLKER: As long as the record is  
14                  clear I'm not waiving my offer of proof with  
15                  respect to the objection that has been raised with  
16                  regard to the inadequate notice of this hearing,  
17                  and I'm not going to budge on that point, and I'm  
18                  not going to let anyone on this Commission suggest  
19                  otherwise.

20                  MR. PERNELL: All we want you to do is  
21                  present --

22                  MR. VOLKER: If anyone on this  
23                  Commission feels that I have the opportunity now  
24                  to now present this testimony --

25                  MR. PERNELL: Present it.

1                   MR. VOLKER:  -- then I wish to pursue  
2                   that by presenting the testimony.

3                   MR. PERNELL:  Mr. Chairman --

4                   CHAIRMAN KEESE:  We've not had --

5                   MR. PERNELL:  -- may he present his  
6                   case?

7                   CHAIRMAN KEESE:  Yes, he may present his  
8                   testimony.  Well, he may present his argument.  We  
9                   have heard no justification that we failed to give  
10                  adequate notice.

11                  MR. HARRIS:  Okay, and I need to note my  
12                  objection for the record, the characterization  
13                  that he's not been permitted to provide proof.  
14                  He's been permitted ample opportunity to provide  
15                  the legal arguments here.

16                  MR. PERNELL:  And we're had no legal  
17                  argument.

18                  MR. HARRIS:  His recourse is to say I  
19                  want to put on non-legal witnesses on legal  
20                  issues.  He has had every avenue to make his case  
21                  and he has been fully permitted those rights.

22                  MR. VOLKER:  That's not true.

23                  MR. HARRIS:  That's my view and my  
24                  position.

25                  MR. VOLKER:  I have been interrupted

1 every time I've tried to speak.

2 COMMISSIONER MOORE: Well, actually,  
3 Counsel, what's happened is you're trying to use a  
4 trick to get us to sign on to some statement that  
5 you're making. You've heard the Chairman  
6 reiterate again and again and again, no, you do  
7 not have the forum to call witnesses; therefore,  
8 the type of testimony that you're trying to get on  
9 the record is simply not relevant to the kind of  
10 hearing that we're holding.

11 So you're not going to get anyone to  
12 agree for the tape, so that you can use the tape  
13 later on in some proposed court case, you're not  
14 going to get it on tape that people won't agree to  
15 your use of a tool that's not relevant to this  
16 hearing. You're here to testify in front of us,  
17 you're here to make a case, your witnesses as they  
18 are so-called, were people who introduced  
19 themselves and could have made the exact same case  
20 that you're trying to make.

21 You don't have the forum, you don't have  
22 the floor to make witness cases in front of us.  
23 It's not that kind of hearing. This is not an  
24 evidentiary hearing. You are not a sworn witness.  
25 That forum was down in San Jose. That forum is

1 not here. You're here to represent, as anyone  
2 else would do, a petition. This is not sworn  
3 testimony. So you're not going to get the  
4 Chairman to agree to what you're asking for,  
5 either on tape, in writing or otherwise. You're  
6 free to make your case and we're all here to  
7 listen to it.

8 CHAIRMAN KEESE: Okay. We'll listen.

9 MR. VOLKER: I would reiterate that we  
10 are prepared to present testimony today that the  
11 Petitioners were not afforded adequate notice of  
12 this proceeding, and I would reiterate my request  
13 that we be permitted to present that testimony to  
14 the Commission.

15 May I have a response so that I know  
16 whether to proceed in that way or not?

17 CHAIRMAN KEESE: No, we're not -- we're  
18 taking argument, not testimony.

19 MR. PERNELL: We're listening, we're not  
20 responding right now.

21 MR. VOLKER: I'll move on, then, to a  
22 summarization of the petition that we filed on  
23 October 24.

24 It is undisputed that the Metcalf Energy  
25 Center violates literally dozens of local

1       ordinances, regulations and standards. These are  
2       set forth in our petition at pages three to six  
3       and 14 to 17. These include a number of  
4       provisions of the San Jose General Plan which  
5       establishes standards, limiting land use, riparian  
6       protection, noise levels and visual air quality.

7               With respect to each of these standards  
8       that we have enumerated in our brief, the Metcalf  
9       Energy Center poses a conflict; thus, this  
10      Commission may proceed to approve this project  
11      only if it makes a finding of overriding  
12      considerations under the Warren Alquist Act, as  
13      well as the California Environmental Quality Act.

14             In addition to those local land use  
15      restrictions set forth in San Jose's General Plan  
16      and implementing zoning ordinance, we have recited  
17      in our petition several violations of the rules  
18      governing issuance of PSD permits by the Bay Area  
19      Air Quality Management District, including  
20      certification under Rule 2-2-307, that the  
21      Applicant's facilities in California are in  
22      compliance with applicable state and federal air  
23      emission standards.

24             We would respond to the suggestions in  
25      the opposition memoranda that certification was

1 provided, that the certification provided was  
2 deficient; first, it was provided in May of 1999,  
3 over two years ago, and does not reflect current  
4 conditions. As Mr. Ajlouny noted in his comments  
5 earlier this morning, the Calpine facilities at  
6 Los Medanos and Sutter are apparently not yet in  
7 compliance, according to your staff's assessment  
8 of the situation, as presented in a proceeding  
9 recently before you, Chairman Keese, with regard  
10 to the Los Esteros project.

11 Secondly, the Bay Area Air Quality  
12 Management District has failed to afford a public  
13 hearing with respect to issuance of the PSD  
14 permit, as required under its Rules 2-2-101,  
15 2-2-314 and 2-3-315.

16 Finally, the Air Quality Board had  
17 failed to await completion of an EIR or its  
18 functional equivalent, as required under Local  
19 Rule 2-2-407.1, prior to purporting to approve  
20 this project.

21 Because of these significant violations  
22 of local ordinances, rules, regulations and  
23 standards, it's incumbent upon this Board to  
24 carefully scrutinize this record to make sure that  
25 there is an appropriate evidentiary basis for

1 making an override finding. One of the key  
2 components of such a finding is a determination  
3 that this project is necessary to provide power  
4 for current demand and projected demand.

5 Now, with regard to that latter issue,  
6 we presented in the petition substantial evidence  
7 showing that a number of new facilities have been  
8 approved or are in the approval pipeline with a  
9 construction date anticipated before the summer of  
10 2003, which is the date that Calpine proposes to  
11 commence operation of the Metcalf Energy Center.  
12 These facilities are in the local area. They  
13 include Gilroy One and Two, Spartan One and Two,  
14 and Los Esteros. Together, they would provide 768  
15 megawatts of power and, thus, supply ample power  
16 otherwise to be provided by this project.

17 Perhaps the more important point,  
18 however, is that according to the ISO in a staff  
19 report dated August 17 of this year, the Bay Area  
20 load forecast has declined from 10,000 megawatts  
21 to only 9,000 megawatts, due in part to the  
22 conservation measures employed by California  
23 consumers during this last summer. That greater-  
24 than-ten-percent reduction in demand translates  
25 into a dramatic turnabout in the supply-demand

1 picture. Supply has now overtaken demand,  
2 according to the projections, not only of the ISO  
3 but also in PG&E's 2001 Electric Transmission Grid  
4 Expansion Plan dated October 19 of this year  
5 submitted to the ISO.

6 At Section Four, page six of that plan,  
7 PG&E, which has responsibility to assure adequate  
8 provision of electrical service to its customers,  
9 projects an increase in electrical generation of  
10 5,387 megawatts over the next five years, all of  
11 that to be operational in this year with the  
12 exception of four facilities, three of whom are  
13 already licensed and under construction. Those  
14 include the Calpine Delta facility, the Elk Hills  
15 facility, and the Moss Landing Expansion by Duke  
16 Power. A fourth facility for wind power that  
17 would generate 150 megawatts is expected to be on  
18 line next year.

19 The PG&E plan assumes Metcalf would not  
20 be built. It also assumes and documents the fact  
21 that there would be no blackouts, there would be  
22 lack of adequate supply for projected demand.

23 So, in light of that, we submit that  
24 there is very substantial evidence for this  
25 Commission to reconsider its ruling and to permit



1 consideration of alternative sites that might take  
2 longer to construct, but would pose fewer  
3 environmental problems.

4 We noted in our petition that there were  
5 five alternate sites, and according to witnesses  
6 that we've referenced, this would be the worst  
7 location from an air quality impact standpoint,  
8 because this facility is located in a bowl. It's  
9 at the north end of North Coyote Valley, an area  
10 that is subject to a frequent natural air  
11 inversion, which would lead to excessive days of  
12 cumulative increases in air contaminants locally.

13 The Applicant's witness, Dr. Gary  
14 Rubenstein, admitted that the Applicant had  
15 conducted no modeling to address the accumulation  
16 of air contaminants in North Coyote Valley during  
17 air inversions. This appears in his testimony  
18 dated February 28 of this year at pages 179 to  
19 180, and 188 to 189.

20 In addition, we have learned as of  
21 July 30 of this year that the Applicant would  
22 install an oxidation catalyst and that that would  
23 increase emissions of PM10 by 16.7 tons annually.  
24 Because that pushes the potential level of  
25 emissions of this pollutant over the 100-ton-per-

1       year threshold under federal law, additional  
2       review would be required before this facility  
3       could proceed. The fact that mitigation measures  
4       have been proposed by the Applicant as noted in  
5       the submissions by the staff, your staff and the  
6       Applicant is immaterial because, under federal  
7       law, it's the potential to emit that triggers the  
8       additional reviews required.

9               With that, I thank you for your time and  
10       I have nothing further. I'd be happy to answer  
11       questions and also, we would still wish to reserve  
12       a short rebuttal period.

13              CHAIRMAN KEESE: Thank you.

14              MR. VOLKER: Thank you.

15              CHAIRMAN KEESE: Now, Mr. Garbett, are  
16       you still with us?

17              (No audible response.)

18              CHAIRMAN KEESE: Mr. Garbett?

19              COMMISSIONER LAURIE: The battery on his  
20       com line went down.

21              CHAIRMAN KEESE: Hmm?

22              COMMISSIONER LAURIE: Yes, for  
23       Mr. Garbett.

24              COMMISSIONER LAURIE: Are there  
25       additional members of the public that wish to

1 speak to this item, Mr. Chairman?

2 CHAIRMAN KEESE: Do we have any  
3 additional members of the public that care to  
4 speak to this item?

5 COMMISSIONER LAURIE: Mr. Chairman, if  
6 the Applicant -- Unless the Applicant chooses to  
7 respond, I'm prepared to make a motion.

8 MR. GARBETT: Can Mr. Garbett get a word  
9 in?

10 CHAIRMAN KEESE: Mr. Garbett?

11 MR. GARBETT: Yes. I guess I wasn't  
12 being heard. I filed a timely petition with the  
13 California Supreme Court, and the reason for it is  
14 there was a conflict between the regulations as to  
15 whether reconsideration could be given or not.

16 At the time the thing was filed, I'm  
17 going along with Mr. Volker on time of service and  
18 notice of meetings, because I had not received a  
19 final determination from the Commission at the  
20 time the brief was filed. Because I did not have  
21 the supporting documents, the brief was lost in  
22 the Supreme Court; however, it was a timely  
23 filing.

24 And the points of law that were made in  
25 that petition can be considered arguendo a notice

1 of defects in law of the Commission, which you  
2 should be considering at this hearing, under my  
3 public comments at this time. And I do go along  
4 with Mr. Volker on the timing of the notice of  
5 meetings. I accidentally stumbled into Sacramento  
6 was the only reason why I had timely notice.  
7 Thank you.

8 CHAIRMAN KEESE: Thank you. The  
9 standard in front of us is whether -- We are here  
10 for a petition for reconsideration, and the  
11 question in front of us is whether we have heard  
12 clear, had demonstrated to us clear legal error  
13 that should cause us to reconsider our previous  
14 action. And I would ask if there are any members  
15 of the Commission who feel that we have heard  
16 clear legal error and would act on it.

17 COMMISSIONER LAURIE: Mr. Chairman, I am  
18 prepared to make a motion based upon the written  
19 filings and the comments by the Petitioners. I  
20 suppose if the Applicants feel a need to respond  
21 we need to give them an opportunity to do so. I  
22 am, however, prepared to make a motion at this  
23 time. I'll take about two minutes, if that's  
24 okay.

25 MR. HARRIS: Well, Mr. Chairman, I'm

1 going to be leaving and then I will be missing  
2 the --

3 COMMISSIONER MOORE: Mr. Chairman, I'm  
4 not sure that there's a -- that a motion is in  
5 order, if there's -- unless it's a motion to  
6 accept the petition for reconsideration. Then the  
7 absence of a motion simply ends the matter. So  
8 I'm not sure what Commissioner Laurie's intent is.

9 CHAIRMAN KEESE: Mr. Chamberlain, what's  
10 your preference? If it is the intent of the  
11 Commission to deny, is it your preference from a  
12 legal perspective to have a motion to deny, or  
13 have the Commission take no action?

14 CHIEF COUNSEL CHAMBERLAIN: I have  
15 normally recommended that the Commission actually  
16 affirmatively deny, if that is your intention,  
17 simply to make it clear for the purpose of -- if  
18 there is any judicial review clock running, that  
19 it would start to run today, rather than at the  
20 end of the 30-day period.

21 CHAIRMAN KEESE: Does a motion to deny  
22 require findings?

23 CHIEF COUNSEL CHAMBERLAIN: No.

24 CHAIRMAN KEESE: We have time  
25 constraints here. Commissioner Laurie --

1                   COMMISSIONER LAURIE: Mr. Chairman, I  
2 would move to deny.

3                   CHAIRMAN KEESE: We have a motion to  
4 deny by Commissioner Laurie.

5                   MR. PERNELL: Second.

6                   CHAIRMAN KEESE: Seconded by  
7 Commissioner Pernell. Any further discussion?

8 All in favor?

9 (Ayes.)

10                  CHAIRMAN KEESE: Opposed?

11 Denied, five to nothing. Thank you.

12 Energy Commission Committee and  
13 Oversight?

14 (No audible response.)

15                  CHAIRMAN KEESE: Chief Counsel's report?

16                  CHIEF COUNSEL CHAMBERLAIN: I have no  
17 report today, Mr. Chairman.

18                  CHAIRMAN KEESE: Executive Director's  
19 report?

20                  EXECUTIVE DIRECTOR LARSON: No report  
21 today, Mr. Chairman.

22                  CHAIRMAN KEESE: Public Advisor's  
23 report?

24                  PUBLIC ADVISOR MENDONCA: No report  
25 today, Mr. Chairman.

1                   CHAIRMAN KEESE:  Do we have any public  
2           comment on other issues?

3                   (No audible response.)

4                   CHAIRMAN KEESE:  Hearing none, this  
5           meeting is adjourned.  Thank you.

6                   (Whereupon, at 10:20 a.m., the  
7           meeting was adjourned.)

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## CERTIFICATE OF REPORTER

I, JAMES RAMOS, an Electronic Reporter,  
do hereby certify that I am a disinterested person  
herein; that I recorded the foregoing California  
Energy Commission Workshop; that it was thereafter  
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I further certify that I am not of  
counsel or attorney for any of the parties to said  
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